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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 477

IN THE MATTER OF THE APPLICATION
of the
CITY OF PHILADELPHIA,
Petitioner,
against
RALPH COHEN,
Respondent.

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is submitted by the City of New York as *amicus curiae*, pursuant to Subdivision 4 of Rule 42 of the Rules of this Court, in support of the petition by the City of Philadelphia for a writ of certiorari.

The City of New York is a political subdivision of the State of New York, and this brief is sponsored by the undersigned, the Corporation Counsel of the City of New York, and the authorized law officer thereof.

Interest of the *Amicus Curiae*

In administering its Sales Tax, General Business and Financial Tax, and other excise taxes, the City of New

York frequently finds that a taxpayer, owing substantial amounts of taxes, has removed to another state. At present the right to proceed against such a tax evader in the other state is clear only if a judgment for the taxes has been first obtained in the taxing jurisdiction [*Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935)], or such other state by comity (either statutory or decisional) permits such suits.

Facts

(1)

The complaint alleges that the defendant is a resident of the State of New York and that, while a resident of Philadelphia, Pa., during the period from October 1954 to March 1959, was engaged in the business of conducting a public parking lot in that City and incurred a liability for the Philadelphia Public Parking Lot Tax (fols. 35-37).

It alleges further that although the defendant filed returns and paid part of such tax during that period, additional tax in the principal amount of $5,057.44 is due from him to the City of Philadelphia (fols. 38-42).

The complaint seeks to recover the aforesaid sum plus interest and penalty thereon (fols. 46-48).

(2)

The Public Parking Lot tax of the City of Philadelphia here in issue has been held by the Pennsylvania Supreme Court to be a valid exercise of the state taxing power by the City of Philadelphia. *City and County of Philadelphia* v. *Samuels*, 338 Pa. 321, 12 A. 2d 79 (1940); *City of Philadelphia* v. *Eglins Garages*, 342 Pa. 142, 19 A. 2d 845 (1941).

Pertinent Constitutional and Judicial Code Provisions

U. S. Constitution:

Article IV, Section 1, of the Federal Constitution provides that:

> "Section 1. Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Judicial Code:

The history and development of the congressional act implementing the Full Faith and Credit Clause will be described.

(1)

The Act of May 26, 1790, c. 11, 1 Stat. 122, provides that "the acts of the legislatures of the several states" shall be authenticated by having the respective state seal affixed thereto; and that "the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States," by the attestation of the clerk, the seal of the court and a certificate of the judge. It then states:

> "And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

By Act of March 27, 1804, c. 56, § 2, 2 Stat. 299, the enactment was made applicable to the territories and pos-

sessions of the United States, and, as so amended, subsequently became Section 905 of the Revised Statutes and Section 687 of the Judicial Code (28 U.S.C. § 687).

In the 1948 revision of the Judicial Code (Act of June 25, 1948, c. 646, 62 Stat. 947), Section 687 was renumbered Section 1738 and divided into three separate unnumbered paragraphs (28 U.S.C. § 1738).

The first paragraph provides for the authentication of "Acts of the legislature of any State, Territory or Possession," etc.

The second paragraph provides for proof and admission of the "records and judicial proceedings" of any court of a State, Territory or Possession in other courts.

The third paragraph states:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

(2)

A separate provision relating to non-judicial records or books "kept in any public office", of any State, Territory or Possession of the United States, provides for their authentication and states that they shall be entitled to full faith and credit in every court and office within the United States and its Territories and Possessions. Act of March 27, 1804, c. 56, § 1, 2 Stat. 298; R. S. § 906; 28 U.S.C. § 688; *id.* § 1739.

Argument

I. The provision of Article IV, Section 1, of the Constitution requiring each state to give full faith and credit to

the "public Acts" of every other state applies to state revenue laws.

II. Municipal ordinances constitute "public Acts" of a state under the Full Faith and Credit Clause.

POINT I

The provision of Article IV, Section 1, of the Constitution requiring each state to give full faith and credit to the "public Acts" of every other state applies to state revenue laws.

(1)

In *Milwaukee County* v. *White Co.*, 296 U. S. 268, 275 (1935), this Court expressly left open the question whether the Full Faith and Credit Clause requires one state to enforce the revenue laws of another. *Amicus curiae* here contends that the question should now be decided.

Prior to the revision of the Judicial Code in 1948, there appears to have been some doubt on the part of Congress with regard to whether the Full Faith and Credit Clause was applicable to statutes of a state, since the provision of the Judicial Code implementing the Constitutional Clause only referred to "records and judicial proceedings." *Huntington* v. *Attrill*, 146 U. S. 657, 683-684 (1892); *Hughes* v. *Fetter*, 341 U. S. 609, 613, footnote 16 (1951). In the 1948 revision of the Code, Congress eliminated any such doubt by making the Clause applicable to "Acts, records and judicial proceedings" (*supra*, p. 4). However, even prior to 1948, this Court in a number of decisions had held the Clause applicable to state statutes.

(2)

The modern development of the application of the Full Faith and Credit Clause to state statutes really begins with the decision of Mr. Justice BRANDEIS in *Bradford*

Electric Co. v. *Clapper*, 286 U. S. 145 (1932), a case in which the Vermont workmen's compensation law was held applicable to an action in the New Hampshire courts. The action arose out of an accident in New Hampshire in which an employee of the defendant electric company was killed, where both the plaintiff employee and the defendant electric company were residents of Vermont, and where the Court sustained the company's claim that the Vermont workmen's compensation law must be applied by the New Hampshire court.

The opinion first states that the provision in the Full Faith and Credit Clause referring to "public Acts" of a state applies to statutes (*id.* at pp. 154-155).

It then states that applying the Vermont Act in the case "can not, in any proper sense, be termed an extra-territorial application of that Act" for the reason that it does not prohibit acts "beyond the borders of the State" but affects "only *the rights and liabilities of parties who by their conduct within the State have subjected themselves to its operation* (stress added; *id.*, p. 157 and footnote 7). It said that the Vermont Act had created "a statutory relation between the parties," the incidents of which were subject to regulation in Vermont as long as the relation persisted, and that (*id.*, p. 158):

> "The mere recognition by the courts of one State that parties by their conduct have subjected themselves to certain obligations arising under the law of another State is not to be deemed an extra-territorial application of the law of the State creating the obligation."

In *Broderick* v. *Rosner*, 294 U. S. 629 (1935), this Court again applied the Full Faith and Credit Clause to a state statute. In that case the New York Superintendent of Banks sued in the New Jersey courts to enforce the statutory liability of New Jersey stockholders of an insolvent New York bank.

In sustaining the right of the Superintendent to sue in the New Jersey courts, the Supreme Court described the liability of the stockholders sought to be enforced as a "voluntarily assumed statutory obligation" incurred by the stockholders who, to that extent, had submitted themselves "to the jurisdiction and laws" of the state of incorporation of the bank (*id.*, pp. 644, 645). It then concluded that where a State has had "jurisdiction of the subject matter and the parties, *obligations validly imposed upon them by statute* must, within the limitations above stated, be given full faith and credit by all the other States" (stress added, *id.*, p. 645).

More recently in *Hughes* v. *Fetter*, 341 U. S. 609 (1951), it was held that in an action brought in Wisconsin for damages for death arising out of an automobile accident in Illinois, the Wisconsin courts must give full faith and credit to the Illinois wrongful death statute, despite a provision of the Wisconsin wrongful death statute limiting a right of action only to deaths caused in Wisconsin. The Court stated that the local Wisconsin policy must give way to the "strong unifying principle embodied in the Full Faith and Credit Clause looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states" (p. 612) and that any such exclusion is forbidden by the "national policy" of such Clause (p. 613).

What is the difference between the obligations imposed in *Bradford Electric Co.* v. *Clapper*, *Broderick* v. *Rosner* and *Hughes* v. *Fetter* under the Full Faith and Credit Clause and the obligation sought to be imposed on the present defendant? Here, the defendant just as clearly subjected himself to the operation of the taxing statutes of Pennsylvania as the persons involved in those cases subjected themselves to the statutes given full faith and credit therein.

The demand here, as in those cases, is to recover a money judgment in one state (New York) based on an

obligation incurred by the defendant by his conduct in another state (Pennsylvania), under a statute of that state. Since full faith and credit was required to be given to the statutes in those cases it should be given to the Pennsylvania statute in the present case.

(3)

In *Broderick* v. *Rosner*, 294 U. S. 629 (1935), the Court pointed out that the Full Faith and Credit Clause does not require one state to enforce every right conferred by the statutes of another, although "the room left for the play of conflicting policies is a narrow one" (*id.*, p. 642). One limitation, the Court noted, is that a state need not enforce the penal laws of another state, citing *Huntington* v. *Attrill*, 146 U. S. 657 (1892).

Laws imposing taxes at one time appear to have been considered penal in nature. For example, in *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265 (188), the Court stated that penal laws of one country not enforced by courts of another include not only crimes and misdemeanors but also "pecuniary penalties for any violation of statutes for the protection of its revenue" (*id.*, p. 290).

Subsequently, in *Huntington* v. *Attrill*, 146 U. S. 657 (1892), this portion of the *Pelican* opinion was discussed (146 U. S., at pp. 671-673), after which the Court concluded that " 'criminal laws', that is to say, laws punishing crimes (constitute) the whole class of penal laws which cannot be enforced extra-territorially" (*id.*, pp. 674-675).

The Court then held that the provision of New York law imposing personal liability on corporate officers for debts of the corporation (where they signed false certificates) was in no sense a "criminal or *quasi*-criminal law" or constituted administering "a punishment imposed upon an offender," (*id.*, p. 676), and that a judgment therefor must be given full faith and credit in the courts of Maryland.

The holding in *Huntington* v. *Attrill* limits the concept of penal laws that are unenforcible in another state to those traditionally deemed penal in nature; *i.e.*, criminal laws.

This Court dispelled any doubt about the fact that it deemed tax laws not to be penal in *Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935), where it said that (p. 271):

> "the obligation to pay taxes is not penal. It is a statutory liability, *quasi*-contractual in nature, enforcible, if there is no exclusive statutory remedy, in the civil courts by the common law action of debt or *indebitatus assumpsit*."

Cf. State ex rel. Oklahoma v. *Rodgers*, 238 Mo. App. 1115, 193 S. W. 2d 919 (1946), where the Missouri court, in permitting Oklahoma to sue for taxes as a matter of comity, concluded that tax laws should not be deemed penal because "Tax laws are not passed to punish people" (193 S. W. 2d, at p. 926).

(4)

We have already shown that public acts of a state are entitled to full faith and credit. The cases just discussed establish that tax laws are not regarded as penal laws under the exception to that constitutional mandate. There is no sound ground for creating an additional exception for tax laws. Quite the converse is true. As noted above, one court has said that tax laws are not designed to punish people. In Justice Holmes' trenchant phrase, "Taxes are what we pay for civilized society" [*Compania de Tabacos* v. *Collector*, 275 U. S. 87, 100 (1927)].

Once it has been established that statutes of another state are entitled to full faith and credit, there would appear to be no basis, in the absence of an overriding reason for excepting tax laws from the requirement of full faith and credit, for a court of one state to refuse to enforce a normal tax law enacted by another state or its political subdivision.

(5)

Our research indicates that the question here in issue (whether the Full Faith and Credit Clause requires one state to enforce the revenue laws of another) has never been previously considered by any federal court. In *Milwaukee County* v. *White Co.*, 296 U. S. 268 (1935), at page 274, footnote 3, it is stated that the question was decided in *Moore* v. *Mitchell*, 30 F. 2d 600 (2nd Circ., 1929), aff'd on o.g. 281 U. S. 18 (1930). However, examination of the record and briefs in the *Moore* case reveals that the plaintiff there relied solely on grounds of comity and that full faith and credit was not discussed in the briefs of either side. In dismissing the complaint the Court made no reference to the Full Faith and Credit Clause, holding simply that principles of "private international law" precluded one state from acting as a collector of taxes for another. 30 F. 2d at page 602. Judge Learned Hand, in concurring, made no mention of full faith and credit. He concurred on the ground that the courts in enforcing such taxes would have to inquire into the basis of the liability, with the possibility of passing "upon the provisions for the public order of another state", and thereby embarrassing its neighbor (*id.*, p. 604).

We have also found no state court in which this question has been decided, other than the present case, and a 1950 case in the Appellate Division of the New York Supreme Court, where the complaint was dismissed. *Wayne Co.* (*Mich.*) v. *American Steel Export Co.*, 277 App. Div. 585 (1st Dept.).

Colorado v. *Harbeck*, 232 N. Y. 71 (1921), like *Moore* v. *Mitchell* (*supra*), was decided on the ground that comity did not require the court to entertain a suit for another state's taxes, and all the other cases in which state courts have refused to enforce taxes of another state appear to have been decided on the same ground.

POINT II

Municipal ordinances constitute "public Acts" of a state under the Full Faith and Credit Clause.

The fact that the tax sought to be enforced herein arises under a municipal ordinance rather than under a state statute does not make the Full Faith and Credit Clause any the less applicable, since ordinances are "public Acts" of a state within the meaning of the Full Faith and Credit Clause.

This Court in construing other provisions of the Constitution relating to state action has made it clear that municipal ordinances are deemed state legislation.

Thus, it has held that the provision of the Fourteenth Amendment reading "nor shall any State deprive any person of * * * property, without due process of law," and the provision of the Contract Clause (Art. I, § 10, Cl. 1) that "No State shall * * * pass any * * * Law impairing the Obligation of Contracts," both apply to municipal ordinances. *New Orleans Waterworks Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 31 (1888); *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 295 (1913); *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 577 (1919).

In the *Standard Scale Co.* case, the Court held this to be so (249 U. S., at p. 577):

> "For the protection of the Federal Constitution applies, whatever the form in which the legislative power of the State is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission."

A municipal ordinance is deemed "a statute of any State" within the provision of the Judicial Code giving

this Court jurisdiction to review by appeal judgments of state courts "where is drawn in question the validity of a statute of any State," etc. *King Mfg. Co.* v. *Augusta*, 277 U. S. 100 (1928); *Jamison* v. *Texas*, 318 U. S. 413 (1943).

In the *King Mfg. Co.* case, Mr. Justice BRANDEIS dissenting, concluded that the legislative history of the provision regulating this Court's appellate jurisdiction indicated that such appeals in cases involving ordinances were not intended by Congress. But he expressly recognized that under the Constitution ordinances were deemed to be state legislation, saying that "as the enactments of a subordinate body exercising legislative authority are a part of the laws of a State, an ordinance or an order is a law within the meaning of the contract clause and is state action within the prohibitions of the Fourteenth Amendment" (277 U. S., at p. 126).

CONCLUSION

The petition for a writ of certiorari herein should be granted.

October 17, 1962.

Respectfully submitted,

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